EXHIBIT 7

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

INTERNATIONAL FINANCE CORPORATION,

Plaintiff,

v. 07 Civ. 5451 (SHS)

KORAT WASTE TO ENERGY CO., LTD.,

Defendant.

----------x

March 27, 2008
12:10 p.m.

Before:

HON. SIDNEY H. STEIN,

District Judge

APPEARANCES

WHITE & CASE, L.L.P.
Attorneys for Plaintiff
BY: FRANK A. VASQUEZ, JR.

WALLACE KING DOMIKE & REISKIN, P.L.L.C.
Attorneys for Defendant
BY: ANTHONY FRAZIER KING
-and-
MORVILLO, ABRAMOWITZ, GRAND, IASON, ANELLO & BOHRER, P.C.
Attorneys for Defendant
BY: THOMAS M. KEANE

(Case called)

THE DEPUTY CLERK: Counsel, please state your names for the record.

MR. VASQUEZ: Frank Vasquez of White & Case. I'm here for plaintiff IFC.

THE COURT: Good morning, sir.

MR. VASQUEZ: Good morning.

MR. KING: Anthony King of Wallace, King for defendant, Korat Waste Energy.

MR. KEANE: And Thomas Keane of Morvillo, Abramowitz also for Korat Waste Energy.

THE COURT: Good morning. Won't all of you please be seated?

What I wanted to do this morning is three-fold: First, to read into the record a decision granting in part and denying in part Korat's motion to dismiss, and I will then enter a minute order that simply says for the reasons set forth on the record, the motion to dismiss is granted in part and denied in part. Then I wanted to see how I can assist the parties and partially debrief a discovery dispute. And, third, I want to see if we can set up a track for attempting to resolve it.

My decision is as follows:

Plaintiff IFC is an international organization headquartered in Washington, D.C. and brings this action in its

capacity as trustee of the IFC Netherlands carbon facility, which I will refer to as INCaF.

The action is brought against defendant Korat Waste Energy Company limited, which I will refer to as Korat, that's a corporation organized under the laws of Thailand. On May 17, 2004, IFC and Korat executed a letter of intent which I will also refer to as the LOI, documenting their intention to negotiate Korat's sale of certified emission reductions, which I will refer to either as CERs or by their common name, carbon credits, to IFC. In other words, the sale of the carbon credits was going to be from Korat to IFC. The parties never finalized their negotiations and on March 2, 2007, Korat exercised its option to terminate the letter of intent. IFC then commenced this action for breach of the implied covenant of good faith and fair dealing, breach of contract, termination payment due under the terms of the letter of intent and reimbursement of various expenses incurred during negotiations and in this litigation.

Korat has now moved, pursuant to Rule 12(b)(6), to dismiss each of the four claims asserted in the complaint except as to the claim for a termination payment as to which it concedes liability.

As I will explain in this opinion, the allegations in the complaint and the documents attached to the complaint as exhibits do not support IFC's contention that the parties

reached agreement on all material terms for sale of the carbon credits. IFC has thus failed to state a claim for breach of contract but it has sufficiently stated a claim for breach of covenant of good faith and fair dealing implicit in the letter of intent by alleging that Korat negotiated for sale of the carbon credits in bad faith.

Finally, IFC's claim for negotiation expenses and attorney's fees fails as a matter of law because the language of the letter of intent's indemnification clause does not contain an intention to permit recovery of those expenses.

In deciding a motion to dismiss, pursuant to Rule 12(b)(6) I am to consider the allegations in the complaint and documents that are attached to the complaint as exhibits or are incorporated in the complaint by reference and any document upon which the complaint "solely relies and which is integral to it." Roth v. Jennings, 489 F.3d 499, 509, (2d Cir. 2007). I accept the factual allegations, as I must, that are set forth in the complaint, as true, and I must draw the inferences from those allegations in the light most favorable to plaintiff. However, if the complaint contains assertions regarding the contents of the document that are contradicted by the document itself, the document controls. Roth v. Jennings, at 510 to 511.

Here the complaint has six exhibits, all of which I am considering in deciding the motion to dismiss and, in addition,

IFC concedes that the letter of intent which Korat attaches to the motion to dismiss is integral to the complaint and appropriate to consider. That concession, as I think is appropriate, is in IFC's memorandum in opposition to the motion at page 8. Therefore, I will consider on this motion the complaint, the six exhibits attached to the complaint and, on consent, the letter of intent.

On the other hand, the complaint makes only fleeting references to the document that's entitled "Draft Term Sheet" that Korat also attaches to its motion to dismiss. Fleeting references are in paragraph 19 of the complaint. Because they do characterize them as just tangential references, the "Draft Term Sheet" is not integral to the complaint and I'm not considering it on this 12(b)(6) motion. You will see even were I to consider it, the outcome would still be the same.

The following facts were taken from the complaint and the exhibits to the complaint and the letter of intent:

IFC is an independent member of the World Bank Group with a membership of 179 countries and its goals include the promotion of economic development by encouraging the growth of productive enterprises and efficient capital markets in its member countries. And, it also serves as a trustee of INCaF. Complaint, paragraphs 8 and 9.

Korat intends to build and operate a methane recovery and waste energy facility in Khorat, Thailand. For a period of

10 years, this facility will treat wastewater and capture bio gas which will be used in place of heavy fuel oil to generate electricity. The project is expected to generate carbon credits which are credits created when a facility reduces the amount of greenhouse gas emissions that otherwise would have been produced. Under the terms of the Kyoto protocol, an international and environmental treaty, signatory nations may trade carbon credits in order to meet national targets for greenhouse gas emissions. That's in the complaint at paragraphs 2 and 13.

In early 2002, EcoSecurities Group PLC suggested Korat's project to IFC as a source of carbon credits that the Netherlands could use to meet its emissions targets. At that time, EcoSecurities was an advisor and consultant to Korat. IFC subsequently entered into the negotiations with Korat in its capacity as a trustee of INCaF and, on May 20th, 2004, IFC and Korat executed the Letter of Intent in which they expressed their intention to negotiate an Emission Reduction Purchase Agreement -- I will also call that the ERPA -- governing the sale of carbon credits. That is the complaint at paragraphs 14 and 15 and the Letter of Intent dated May 17, 2004 at page 1.

The purpose of the Letter of Intent was to "set forth the basis on which IFC will work with Korat in preparing and executing purchase of" the carbon credits generated by Korat's project. The Letter of Intent stated INCaF's "preliminary

expectation" to pay three Euros per metric ton of carbon credits and to purchase between 2 and 2.25 million metric tons of carbon credits during the period ending December 31, 2012. The Letter of Intent expressly stated, however, that IFC would not be bound to purchase any carbon credits unless and until IFC and Korat had executed an ERPA and the terms of that ERPA had been satisfied. All of those facts are taken from the Letter of Intent in the complaint at paragraph 15.

The Letter of Intent contains the following relevant provisions. Paragraph 4 confers "preferential status" on IFC by permitting Korat to enter into agreements with third-parties for the sale of carbon credits only after it had first offered them to IFC. Paragraph 7(a)(i) permitted either party to terminate the agreement on 15 days' notice, and paragraph 7(d) provided that in the event that Korat was the party elected to terminate, it would be required to pay IFC $25,000 for expenses incurred before due diligence and an additional amount up to $100,000 for IFC's appraisal, due diligence, and environmental assessment and legal expenses. Paragraph 7(g) provides that Korat would be liable for an additional $300,000 payment if it were to enter into an agreement for the sale of carbon credits with a third-party within one year of electing to terminate the agreement. That's all from the Letter of Intent in the complaint at paragraph 15.

Finally, paragraph 12 of the Letter of Intent labeled

"Indemnity" provided that Korat would hold IFC "harmless against any losses, claims, damages or liabilities to which it or its governors, directors, employees, agents, consultants or legal counsel might become subject in connection with any of their activities as contemplated under" the Letter of Intent, and that Korat would reimburse IFC "for any expenses including legal expenses" IFC incurred "in connection therewith or with the investigation or in defense thereof" except in the case of gross negligence or willful misconduct.

In a May 26, 2005 e-mail to IFC's Peter Cook, which is approximately one year after the Letter of Intent was entered into, Korat's Ken Lochlin proposed to sell IFC 1.5 million tons of carbon credits at a price of 4.75 Euros per ton, subject to a number of conditions regarding such issues as IFC's priority right to purchase additional carbon credits; Korat's liability for failure to deliver the full amount of carbon credits requested or for selling IFC's carbon credits to third-parties; and an extension of termination date in the event that Korat failed to deliver all of the carbon credits promised.

Lochlin stated "if these terms are broadly acceptable to IFC, we are now prepared to move quickly to finalize an updated term sheet which reflects them and proceed with the completion of the balancing of the purchase and sale documentation." That is the complaint, paragraph 18, and the e-mail from Lochlin to Cook dated May 26, 2005 which is Exhibit

D in the complaint.

On June 10, 2005, Lochlin again e-mailed IFC's Cook and stated that he understood from communications between the parties that "IFC would have an interest in an agreement to purchase 1.75 million tons of Korat carbon credits at a price of 4.25 Euros per ton from the 2006 vintage onward, on terms otherwise in keeping with Korat's last proposal." Lochlin stated that "of course this is both a higher purchase price and a lower proposed purchase price than we have previously offered. However, if you are in a position to confirm IFC's interest in such an arrangement, subject to documentation, etc., I will be happy to convey this to the rest of the board on a call we have already scheduled over this weekend, and hopefully revert to a formal response from our side on Monday." That's the June 10, 2005 e-mail from Lochlin to Cook also part of Exhibit D.

That same day, June 10, 2005, IFC's Cook responded in an e-mail by stating, "I can confirm that IFC would agree to a deal on those terms. I look forward to hearing back from you so we can finalize the terms." Cook added that, "provided Korat's board agrees, I would like to move forward quickly." That's the June 10, 2005 Cook to Lochlin e-mail, also part of Exhibit D.

Three and a half months later, on September 21, 2005, according to the complaint, IFC and Korat agreed on a "Final

Term Sheet" reflecting the price and quantity combination discussed in the May through June 2005 e-mail exchange. IFC then began drafting an ERPA which the parties envisioned would be completed by the end of 2005.

October 13, 2005 IFC forwarded a draft ERPA to Korat and, in response, Korat expressed what it referred to as "policy concerns" including that the draft was too long and contained too many covenants. On November 8, 2005, after IFC asked Korat to elaborate on these concerns, Korat provided a memorandum entitled "guidelines for redraft of Korat IFC ERPA." In this memorandum, Korat reiterated its concerns and requested additional terms not in that term sheet. All of this is from the complaint at paragraphs 19 and 20.

IFC provided comments on Korat's memorandum the following day, November 9, 2005 and Korat responded on November 15th informing IFC that it did not believe "sufficient progress" had been made in resolving the parties' "very material and fundamental differences and their positions." Korat thereafter ignored IFC's attempts to discuss revising the ERPA. On December 13, 2005, IFC sent Korat an e-mail offering to redraft the ERPA, and four days later Korat responded that the new ERPA would have to be substantially different from the original. IFC thereafter retained English counsel, at what it alleges was considerable expense, to undertake a review of the ERPA. It then sent Korat a revised version. Korat never

responded to that draft. Complaint, paragraphs 121, 23, 25.

In a July 14, 2006 e-mail, Korat's G. Pete Smith asked IFC's Cook to consider paying a higher price for the carbon credits explaining that "because Korat's board members consider price to be the central issue, we would like to request from you what price or price range IFC can now consider." Smith told Cook that although "IFC's might not be as high as current commercial prices, there is willingness to consider a lower price based on the financial strength by IFC relative to other potential buyers." Smith stated that "if the price issue can be resolved, then we will discuss other details in the ERPA."

At an October 17, 2006 meeting, IFC proposed to pay 7.25 Euros per carbon credit to purchase an additional 250,000 carbon credits after 2012 at that same price. It also offered to help Korat obtain the Thai government's approval for the project and to advance Korat's legal expenses which it would recoup only if the ERPA were executed. Complaint paragraphs 26 and 27 and e-mail from Smith to Cook dated July 14, 2006 which is Exhibit E to the complaint.

In an e-mail to IFC dated October 19th, 2006, two days after this meeting, Korat's Lochlin took issue with IFC's statement that Korat was "dragging its feet" in the negotiations. Lochlin stated that although other parties had offered to pay Korat between $10 and $11.50 per carbon credit which Korat described as "attractive" offers, "the

acceptability of the final determination will not be based solely on the offered price levels or delivery tonnages but will also be impacted by the specifics of the ERPA documentation." Lochlin explained that IFC's draft ERPA was two or three times longer than the other ERPAs that IFC had previously executed and that while he appreciated IFC's willingness to address unintended potential problems, Korat identified in the draft he remained concerned about how the ERPA's terms "might impact Korat's future commercial operations." This is from the October 19th, 2006 e-mail from Lochlin to Widge and Cook, Exhibit B to the complaint.

In an e-mail to Korat's Lochlin and Smith on November 10, 2006, Cook set forth what he described as "IFC's final good faith attempt to deal with Korat's remaining concerns" which he understood Korat would "discuss with its board and revert promptly thereafter." That's Exhibit B, it is the Cook to Lochlin and Smith e-mail dated November 10, 2006. Cook also stated that "we note with interest your frank admissions indicating that you have been discussing prices and terms for the Korat carbon credits that are the subject of the binding commercial terms in the IFC/Korat Letter of Intent. We believe that the Letter of Intent of May 2004 does not give Korat the ability to treat IFC and INCaF as a put option and engage with us intermittently and continue to defer signing the ERPA to gauge how the market plays out." Cook asked Korat to respond

to its terms by November 30, 2006. That's all from the November 10, 2006 e-mail.

In response, on November 15, 2006, Lochlin responded to Cook's e-mail and stated, "at no point has it been our intention to play the market in our discussions with IFC consistent with the May 2004 LOI. We have been negotiating in good faith with IFC for two and a half years through multiple negotiations." Lochlin also noted that Korat's statements regarding the offers it had received from third-parties was "a further indication of our frank approach and our good faith efforts to reach commercially and legally acceptable terms with IFC pursuant to the LOI." He promised that Korat would complete its internal review of discussions with board members promptly. All of that is from the November 15, 2006 e-mail which is Exhibit B.

On February 8, 2007, the Thai government approved Korat's application to register its project with the United Nations Framework Convention on Climate Change. Without this approval, Korat would have been unable to sell its carbon credits on the carbon market. That's complaint paragraph 17 and 30.

A month later, March 2nd, 2007, Korat sent IFC notice that it was invoking its right to terminate the Letter of Intent as of March 17, 2007, and in that notice Korat stated that since the execution of the Letter of Intent, "the market

for CER and CER prices in particular have changed considerably. Yet, the terms in the current draft ERPA provided by IFC still fail to reflect market conditions for this type of transaction. For these reasons, it has been concluded that it is not worthwhile for Korat to continue to devote resources to the negotiations." That's Exhibit A to the complaint. Korat acknowledged that its decision to terminate the agreement triggered its obligation to make a termination payment pursuant to paragraph 7(d) of the Letter of Intent and it requests that an invoice of IFC's services.

On March 29, 2007, Korat registered its project with the executive board of the U.N. Framework Convention on Climate Change. Complaint paragraph 33 and its supporting documents.

Korat identified both itself and EcoSecurities as "project participants." IFC alleges that EcoSecurities, which had simply been Korat's advisor, had "accumulated a portfolio of carbon credits on its own" and speculates that EcoSecurities had purchased some of those credits from the Korat project. Complaint, paragraph 33.

IFC asserts four causes of action in the complaint. First, IFC alleges that Korat breached the covenant of good faith and fair dealing, instinct in the May 20, 2004 Letter of Intent by failing to negotiate good faith toward a final ERPA. IFC alleges that Korat had no intention of executing a final agreement and used the Letter of Intent as a "put option

agreement" or fallback to obtain leverage in the marketplace while shopping for other buyers. IFC also alleges that Korat entered into the Letter of Intent because the credibility it gained from a relationship of IFC would help persuade the Thai government to approve the project. Complaint, paragraph 16 and 41 and 42.

IFC also alleges that in the May through June 2005 e-mail exchange, IFC and Korat reached a binding agreement as to all the material terms of its sale of the carbon credits. Its second cause of action asserts that Korat's failure to negotiate toward final ERPA constitutes a breach of the contract which IFC finds in the May through June 2005 e-mails. All right?

So, cause one is breach of the covenant of good faith and fair dealing and cause of action two is breach of the contract which is the May through June '05 e-mails.

The third cause of action is a claim that Korat is liable for termination payment pursuant both to paragraph 7(d) of the Letter of Intent because of its election to terminate the agreement and, again, that's conceded by Korat, but it also claims it is entitled to a payment pursuant to 7(g) because Korat entered into an agreement with a third-party for the sale of the carbon credits within one year of termination. Complaint, paragraphs 52 to 54.

In the fourth cause of action, IFC seeks to recover

the fees and expenses it incurred in its negotiation with Korat as well as attorneys' fees and costs incurred in the present litigation pursuant to the Letter of Intent's indemnification clause. Complaint, 57 to 59.

This Court has federal subject matter jurisdiction pursuant to 28 U.S.C. 1331. Any action in which the IFC is a party is deemed to arise under the laws of the United States and there is original jurisdiction over such actions. 22 U.S.C. Section 282f. This Court has personal jurisdiction over Korat and venue here is proper pursuant to the Letter of Intent's forum selection clause.

Dismissal is appropriate pursuant to Rule 12(b)(6) only if the plaintiff has not pled "enough facts to state a claim to reliefs that is plausible on its face." Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007). A plaintiff's factual allegations must be enough to raise a right to relief above the speculative level." Twombly at 1965. As noted, when reviewing motion to dismiss, the Court assumes the truth of all facts asserted in the complaint and draws all reasonable inferences from those facts in favor of the plaintiff. See Cleveland v. Caplaw Enterprises, 448 F.3d 518, 512, (2d Cir. 2006).

The Letter of Intent specifies that New York Law governs the interpretation of its terms.

All right, let's turn to the first claim for relief.

The first claim for relief is the breach of the implied covenant of good faith and fair dealing. I am finding that IFC has stated a claim for breach of the applied covenant of good faith and fair dealing.

Under New York Law, a covenant of good faith and fair dealing in the course of contract performance is implicit in all contracts. Dalton v. Educational Testing Service, 87, N.Y.2d 384, 389 (1995). "Encompassed within the implied obligation of each promisor are any promises which a reasonable person in the position of the promisee would be justified in understanding were included." Among those implied obligations is a pledge not to do anything that "will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." No obligation may be implied, however, that "would be inconsistent with other terms of the contractual relationship." Those are all quotes from Dalton v. Educational Testing Service at 389.

Korat contends that IFC has failed to state a claim for breach of this implied covenant because paragraph 7 of the Letter of Intent permitted it to terminate their agreement on 15 days' notice. In its view, an implied obligation to continue negotiation would be inconsistent with this express provision of the contract.

Korat's argument, however, mistakes the nature of IFC's claim. The complaint alleges that Korat breached the

implied covenant of good faith and fair dealing with its conduct during the negotiation of the ERPA. The complaint 16 to 17 and 41 to 42. It does not allege that Korat breached the implied covenant of good faith and fair dealing by terminating the LOI. The issue before this Court is whether IFC has stated a claim that Korat breached the implied covenant of good faith and fair dealing by failing to negotiate in good faith.

Based on the allegations in the complaint and the other documents I have said I am taking into account, that is the exhibits and the LOI, I find that IFC has stated plausible claim of breach of duty to negotiate good faith. For example, IFC alleges that between November and December of 2005 Korat ignored IFC's attempts to discuss revisions to the Emission Reduction Purchase Agreement and then responded only reluctantly and not helpfully to IFC's December 13, 2005 offer to redraft that document. IFC also alleges that Korat totally failed to respond to the revised draft ERPA it sent later that month. Complaint, paragraphs 23 and 25.

More significantly, IFC alleges that Korat kept IFC as a fallback or "put option" while entertaining other offers. This allegation is plausible which, again, is the Supreme Court standard on 12(b)(6) motions for at least two reasons: First, Korat acknowledged it had received other offers it viewed as "attractive," that's the October 19th, 2006 e-mail; and second, IFC alleges that the market price of carbon credits had

increased significantly during the period of the parties' negotiations which, if true, certainly provided Korat with an incentive to hold out as long as possible in the negotiations. Complaint paragraph 16.

IFC also alleges that Korat maintained negotiations with IFC in order to use that relationship to help secure the Thai government's approval for the project. This claim is also plausible. IFC alleges that Korat terminated the agreement after nearly three years of negotiations less than one month after receiving the Thai government approval. Complaint, paragraph 30.

Finally, IFC alleges that EcoSecurities became a purchaser of Korat's carbon credits rather than solely a consultant. According to the complaint, Korat disclosed EcoSecurities' role as a "project participant" as opposed to an advisor in its filing with the executive board of the U.N. Framework Convention on Climate Change on March 29, 2007, less than one month after Korat notified IFC that it was invoking its right to terminate the Letter of Intent. Complaint, paragraphs 30 and 33.

Given how much time the parties spent attempting to reach agreement on the sale of the CERs, it is unlikely although certainly not inconceivable that Korat and ecosystems could have reached agreement in less than one month. Thus, it is possible or at least plausible that Korat had been

negotiating with EcoSecurities while still bound by its commitment under the terms of the Letter of Intent to negotiate exclusively with IFC. That, if true, would violate the Letter of Intent's exclusivity clause and represent a breach of Korat's duty to negotiate in good faith.

Therefore, I'm finding on Count One that IFC has stated a plausible claim for breach of covenant of good faith and fair dealing implicit in the Letter of Intent. Count One, therefore, remains, and I am denying the motion to the extent it seeks dismissal of Count One.

Now Count One remains, as I say, so the question then is what type of damages may IFC seek under Count One? And I am finding that it can recover reliance damages on that claim but it can't recover lost profits, that is, the cost of the carbon credits.

IFC seeks to recover expectation damages on its claim for breach of the implied covenant of good faith and fair dealing. It seeks "replacement costs for the CERs of not less than $18.3 million." That's the complaint at paragraph 16. Under New York Law, however, a party that prevails on the claim for breach of the implied covenant of good faith and fair dealing is limited to reliance damages and it does not obtain benefit of the contract that ultimately was not entered into. In other words, on the breach of a covenant of good faith and fair dealing, you don't receive the benefit of the contract

that was not entered into, that is, you don't receive what you would have received under the ERPA. The ERPA was never entered into. See Goodstein Construction Corp. v. City of New York, 80 N.Y.2d 366, 604 N.E.2d 1356, 590 N.Y.S.2d 425 (1992).

In that case, parties had entered into two "designation agreements" as part of which they agreed to cooperate in preparing a land disposition agreement called an LDA which governed the plaintiff's purchase and development of certain city-owned properties. After plaintiff had incurred substantial expenses negotiating with New York City and preparing the land disposition agreement, the city "de-designated" the plaintiff as the negotiator. Plaintiff sued for breach of contract based on the defendant's failure to negotiate in good faith and sought not only its out-of-pocket expenses but also the profits it expected to have received if they had successfully negotiated the land disposition agreement. The New York Court of Appeals held that "both the law and logic preclude such a recovery."

And the following, these quotes are all from 368, 369, 371 of Goodstein and this quote is from 373,

"Contract damages are ordinarily intended to give the injured party the benefit of the bargain by awarding the sum of money that will, to the extent possible, put that party in as good a position as it would have been had the contract been performed. Here, the defendant's sole obligation under the

designation agreements was to negotiate in good faith. The defendant is neither bound to agree to an LDA nor to continue the negotiating process. To allow the profits that plaintiff might have made under the prospective LDA as the damages for breach of the exclusive negotiating agreement would be basing damages not on the exclusive negotiating agreements but on the prospective terms of a nonexistent contract which the defendant was fully at liberty to reject. It would, in effect, be transforming an agreement to negotiate for a contract into a contract itself."

Here, the Letter of Intent bound Korat to negotiate in good faith toward an Emission Reduction Purchase Agreement. IFC is in exactly the position of Goodstein and, just as in that case, is attempting to "transform an agreement to negotiate for a contract into a contract itself."

Thus, IFC's recovery on Count One -- which I repeat I am allowing -- is going to be its reliance damages and not lost profits.

Now let's turn to Count Two, that is, the claim for breach of contract arising out of the May through June e-mail exchange.

I'm finding that IFC has not alleged a formation of a binding agreement and therefore I am granting the motion dismissing Count Two.

IFC alleges that the parties reached agreement on all

material terms in the course of the May to June 2005 e-mail exchange. IFC calls that the June agreement. Complaint, paragraph 18. Its argument is although that agreement was not the formal ERPA that was contemplated in the Letter of Intent, it was nonetheless a binding agreement since it involved a meeting of the minds on all material terms save only the subsequent execution of the more formal agreement embodying all the terms that have been agreed on.

However, that e-mail exchange which, as I have said on several occasions I am considering on this motion, it is evident that the parties did not reach a meeting of the minds on the two most crucial items, that is, price of the carbon credits and quantity of the carbon credits.

E-mails disclose that on May 5, 2006, Lochlin of Korat wrote to Cook of IFC with a proposal regarding a variety of terms for the carbon credit sale including the price of 4.75 Euros and a quantity of 1.5 million tons. On June 10, Lochlin again e-mailed Cook stating that IFC would be willing to purchase 1.75 million tons of carbon credits at a price of 4.25 Euros. Lochlin, noting that these terms were different than those he had earlier proposed, indicated "he would be happy to convey IFC's offer to the rest of the Korat board." In an e-mail the same day, Cook confirmed IFC's willingness to agree to a deal on those terms and stated that he "looked forward to hearing back" from Lochlin in order for them to "finalize the

terms."

It is abundantly clear from this exchange that the parties never agreed to a price and quantity combination. What is apparent is that Korat made an offer that contained price terms and quantity terms, IFC counter-offered with different price and quantity terms which Korat agreed to take under advisement, and at no point in this exchange did Korat agree to the counter-offer. There was no meeting of the minds on price and quantity and therefore the June agreement was not a binding contract as a matter of law. See Tractebel Energy Marketing v. AEP Power Marketing, Inc., 487 F.3d 89, 95 (2d Cir. 2007).

IFC argues that the standard of review on a motion to dismiss requires that the Court assume that the e-mail exchange is only part of the correspondence between the parties. Therefore, I must deny the motion to dismiss on Count Two. I do draw all permissible inferences from the allegations in the light most favorable to plaintiff but the complaint is clear that the e-mails attached as exhibits are the sole evidence of the June agreement.

Paragraph 18 states that Korat proposed terms in the May 26 e-mail and that "after further negotiations as to the quantity which would be sold to IFC, on June 10, 2005, IFC agreed with Korat on price quantity combination and accepted Korat's other terms. A true and complete copy of the e-mail chain evidencing these discussions and the June agreement is

attached as Exhibit D." That's Complaint paragraph 18.

So, the plaintiff itself is saying that the alleged contract is contained solely within the e-mail exchanges that make up Exhibit D. It can't now allege in its motion papers that there is more documents that constitute the contract.

Paragraph 19 of the complaint alleges the parties subsequently executed a term sheet containing the price and quantity terms agreed to in the June agreement. IFC, however, makes clear in its motion papers that the term sheet merely reflected the agreement that it contends the parties reached in the May to June 2005 e-mail exchange and is not itself the contract IFC is seeking to enforce in this action.

Plaintiff's memorandum of law in opposition to defendant's motion to dismiss at 18. As previously noted, the term sheet is not before the Court. Given that the May to June e-mail exchange does not evidence the formation of the binding of a contract and that paragraph 18 of the complaint alleges that the e-mails annexed as Exhibit D alone evidence the June agreement, it is not permissible for the Court to infer from paragraph 19 that the term sheet, regardless of what it contained, recorded the parties' binding agreement on price and quantity. Moreover, such a reading is not plausible because the allegations are that the parties continue to negotiate regarding the price of the carbon credits as late as October 2006. This belies IFC's contention that the September 2005

term sheet recorded the parties' final agreement on this term.

I have said I am not considering the term sheet which is Exhibit B of Korat's motion papers on this Rule 12(b)(6) motion since it is not part of the complaint. And, I am not going to.

Let me drop a metaphorical footnote and say even if I were to consider that exhibit, it does not help IFC since the actual term sheet which, by the way, is entitled to "Draft Term Sheet" despite the fact that IFC refers to it as the Final Term Sheet that "Draft Term Sheet" the only term sheet I have, makes it clear that its terms are not binding and are subject to contingencies, approvals, and further negotiations. And I am reading from it which is Exhibit B to Korat's motion to dismiss the complaint. It says on the cover of it:

"Important disclaimer: This term sheet is not a complete description of the proposed ERPA apparently being discussed by IFC and Korat and does not constitute an offer or a commitment by IFC or Korat, and no party shall have any liability hereunder. It is intended to serve only as a basis for discussion of the major terms that would apply to the Emission Reduction Purchase Agreement. IFC's authority to enter into the ERPA is contingent on the approval of IFC's management, approval of the Netherlands, and the execution of final documentation." And it goes on. So, again, even if I were to consider it, it is clear that that's not a document

that constitutes a contract.

In sum, the May to June 2005 e-mail exchange does not constitute an agreement for sale of the carbon credits and I am dismissing Count Two. Now let's go on to Count Four.

In Count Four, IFC seeks to recover its expenses and attorneys' fees in connection with negotiations pursuant to the Letter of Intent arrived at the ERPA as well as its legal fees and expenses of this litigation pursuant to the Letter of Intent's indemnification clause. Because the language of this clause does not make it clear that Korat intended to indemnify IFC for legal fees and the expenses of this litigation, IFC's claim is without merit.

Under New York Law "words in a contract are to be construed is to achieve the apparent purpose of the parties." Hooper Associates Ltd. v. AGS Computers, Inc., 74 N.Y.2d 487, 491 (1989). With indemnity clauses, "the word should be restrained to the particular occasion and particular object which the parties had in view to avoid reading into them the duty which the parties did not intend to assume." Accordingly "when a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed." Those quotes are from Hooper Associates Ltd. v. AGS Computers at 365. In addition, "attorneys' fees are the ordinary incidents of litigation" and Court should not infer a parties' intention to pay attorneys' fees as damages "unless the intention to do so

is unmistakably clear in the language of the contract." That's from Oscar Gruss & Son, Inc. v. Hollander, 337 F.3d 186, 199 (2d Cir. 2003) (quoting Hooper Associates, 74 N.Y.2d at 492).

The indemnification clause in the Letter of Intent provides that Korat will indemnify IFC and hold it harmless against "losses, claims, damages or liabilities" to which it or various of its representatives may become subject in connection with any of their activities contemplated under this Letter of Intent." It also required Korat to reimburse any "expenses including legal expenses" that IFC incurred "in connection therewith or with the investigation or defense thereof."

This language does not disclose that the parties intended to permit IFC to recover the expenses it incurred in the course of their negotiations. Most significantly, the clause is addressed to "losses, claims, damages or liabilities," none of which could plausibly encompass IFC's expenses in negotiating the ERPA. Additionally, there is nothing in the clause to suggest that the reference to IFC's "activities as contemplated under this Letter of Intent" should be read so broadly as to include the parties' negotiations in addition to the sale of purchase of carbon credits. Construing this language narrowly, I find no indication that it was intended to permit IFC to recover negotiation expenses.

In addition, a termination clause, which is a separate provision of the Letter of Intent from the current

indemnification provision, provides that Korat will provide IFC with $100,000 for appraisal, due diligence and environmental assessment and legal expenses if it terminates the agreement after the start of due diligence. The parties' inclusion of this liquidated damage provision which was clearly intended to compensate IFC for expenses incurred during the negotiation process belies IFC's intention that the parties also intended a separate indemnification clause to serve the same purpose.

In other words, I'm finding that in terms of "legal expenses" that IFC is not entitled to its attorneys' fees because in New York Law attorneys' fees are generally borne by each party and it is only when the language unmistakably holds otherwise that you find that the legal fees are being shifted from one side to the other. And in terms of legal fees, I just don't find that.

In terms of the negotiation expenses here which apparently they mean their hiring of experts and other expenses associated with the negotiation, I am finding that the normal rules governing contractual interpretation are that those expenses were being handled in the termination clause and the indemnification clause is designed to handle indemnification by Korat of IFC for expenses incurred by IFC in connection with third-party claims. That's not what we are dealing with here. So, the indemnification clause really is for third-party claims. The termination clause handles payment to IFC

including negotiation expenses. So, it is all handled under the contract and I'm not going to find -- I don't think I can under the law -- that the indemnification clause covers legal fees or negotiation expenses.

I refer to the Oscar Gruss case, that's quite persuasive. In that case the plaintiff sought his attorney's fees on the basis of an indemnity clause saying that the defendant would reimburse the plaintiff for any claims, liabilities or damages resulting from the plaintiff's contractual service. And, it also provided that the defendant would "reimburse the plaintiff promptly for any legal or other expenses reasonably incurred by it in connection with investigating, preparing to defend or defending any lawsuits, investigations, claims or other proceedings arising in any manner out of or in connection with the rendering of services by the plaintiff hereunder (including, without limitation, in connection with the enforcement of this agreement in the indemnification obligation set forth herein)." Oscar Gruss at 199.

The Gruss Court construed the first of these provisions to reach only "claims, liabilities and damages" arising from third-party claims. It then read the second provision -- notwithstanding that provision references to expenses incurred "without limitation, in connection with enforcement of this agreement" to also apply only to

third-party claims. That's Oscar Gruss 200.

The Second Circuit explained that other provisions of the indemnification clause such as pertaining to the plaintiff's obligation to notify the defendant of any claims for which it would seek indemnification and the defendant's obligation to obtain the plaintiff's consent before settling any suits made sense only if the indemnification clause were limited to third-party claims. Just as the Second Circuit construed very similar language in Oscar Gruss, I read the indemnification clause here to apply only to third-party claims.

Now, I understand that this clause does not contain the notice and consent provisions that, in the Gruss case, weighed in favor of limiting the indemnification clause to third-party claims. But, on the other hand, the clause here does not contain anything like the countervailing language in Oscar Gruss that provided for indemnification "without limitation in connection with enforcement of this agreement."

As I said, both because under Gruss it is not unmistakeably clear that the parties intended the indemnity clause to apply to these claims and because of the existence of the separate termination clause, I am finding that the legal fees are not recoverable and the contractual language does not permit recovery of negotiations of the expenses either.

So, IFC's claims to recover expenses incurred during

the negotiations and attorneys' fees and legal expenses fails as a matter of law. And, lastly, as correct, concedes the termination payments are due under the termination clause.

All right. I think that handles the motion. Let's go off the record now.

(Discussion off record)